Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

PHILIP E. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED

1. In *Bryan v. United States*, 524 U.S. 184, 194 (1998) the Court said "[I]n certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the *specific provision* of the tax code that he was charged with violating." quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991). In this case the indictment did not purport to cite any substantive statute thought to have been violated. The District Court refused to require the government to state the "true, correct, and complete" list of statutes for which Petitioner was to stand trial, or allow meaningful cross examination concerning the identity of the specific provision allegedly imposing the duty, or to require proof that Petitioner was "aware" of the specific provision imposing the duty.

   The question presented is whether the government may refuse to state the specific provisions of the code allegedly imposing a duty, either by way of indictment, bill of particulars, or by testimony at trial, yet maintain a prosecution and retain a conviction for the failure to comply with the unspecified law.

2. Lower court applications of *United States v. Sullivan*, 274 U.S. 259 (1927) and *Garner v. United States*, 424 U.S. 648 (1976), dealing with compulsory self-incrimination, place them in irreconcilable conflict with each other. The question in this case is whether or not the government may compel the giving of testimony under oath which would in and of itself inescapably incriminate by admission of an element of a crime, regardless of the substance of the testimony given and make it a crime for remaining silent instead of testifying.

3. Petitioner has never been assessed a tax for the years charged in the indictment. Without a tax loss, every aspect of Petitioner's punishment would have been

QUESTIONS PRESENTED – continued

greatly reduced or eliminated completely. The Eighth Circuit panel decision with respect to tax loss cites only one pre-*Cheek* case from the Seventh Circuit, demonstrating once again that the panel decision is unsupportable by any existing Eighth Circuit and Supreme Court precedent. This triggers the question whether the United States Courts may, while imposing a punishment for a finding of an omission crime, namely, 26 U.S.C. § 7203, bypass internal revenue assessment procedures and order Petitioner to pay some $58,000 in "restitution" to the Internal Revenue Service with no express finding that Petitioner owed an income tax for the years charged in the indictment, even though failure to pay was not part of the criminal indictment.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties in the case below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF INCARCERATION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	28
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Boyd v. United States, 116 U.S. 616 (1886) 20

Bryan v. United States, 524 U.S. 184 (1998) 3, 4, 7, 11

Bull v. United States, 295 U.S. 247 (1935) 26

Burnham v. Superior Court of Cal., Marin County, 495 U.S. 604 (1990) 28

Cheek v. United States, 498 U.S. 192 (1991) ..... *passim*

Counselman v. Hitchcock, 142 U.S. 547 (1892) 20

Doyle v. Ohio, 426 U.S. 610 (1976) 19

Fletcher v. Weir, 455 U.S. 603 (1982) 20

Garner v. United States, 424 U.S. 648 (1976) ..... *passim*

Hamling v. United States, 418 U.S. 87 (1974) 6

Hoffman v. United States, 341 U.S. 479 (1951) 14

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 28

Jones v. United States, 526 U.S. 227 (1999) 5

Lisenba v. California, 314 U.S. 219 (1941) 14

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990) 28

Mitchell v. United States, 526 U.S. 314 (1999) 18

Portuondo v. Agard, 529 U.S. 61 (2000) 20

Schmerber v. California, 384 U.S. 757 (1966) 15

St. Paul Fire & Marine Insurance Co. v. Zotta, 149 F.3d 878 (8th Cir. 1998) 22

TABLE OF AUTHORITIES – Continued

Page

Ueckert v. Comm'r of Internal Revenue, 721 F.2d 248 (8th Cir. 1983) 21

United States v. Dack, 747 F.2d 1172 (7th Cir. 1984) 26

United States v. Gaudin, 515 U.S. 506 (1995) 6

United States v. Murdock, 284 U.S. 141 (1931) 17

United States v. Sullivan, 274 U.S. 259 (1927) ..... *passim*

United States v. Troescher, 99 F.3d 933 (9th Cir. 1996) 19

United States v. Tucker, ___ F.3d ___ (8th Cir. 2000) 25

STATUTORY AUTHORITY/RULES:

18 U.S.C. Appx. 2T3.2 23

18 U.S.C. § 3664(e) 27

26 U.S.C. § 6211 26

26 U.S.C. § 6201 25

26 U.S.C. § 6203 25

26 U.S.C. § 6204 25

26 U.S.C. § 6212 ..... 25, 26

26 U.S.C. § 6213 ..... 25, 26

26 U.S.C. § 7203 ..... *passim*

28 U.S.C. § 1254 1

OTHER AUTHORITIES:

United States Constitution, Fifth Amendment .... *passim*

United States Constitution, Sixth Amendment 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals unpublished opinion (per Hanson, Bye, and Melloy (District Judge on assignment)) was entered on May 16, 2001, and may be found at Appendix page 1.

A judgment of conviction was entered on September 26, 2000 and may be found at Appendix page 7. An amended judgment of conviction was entered on October 4, 2000 and appears as Appendix page 19.

The order denying rehearing and rehearing en banc was entered on July 6, 2001 and appears at Appendix page 31.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions at issue in this writ are the Fifth and Sixth Amendments to the United States Constitution. The statutory provisions include 26 U.S.C. § 7203.

STATEMENT OF INCARCERATION

Petitioner is currently serving one (1) year and four (4) months sentence of incarceration to be followed by two (2) years of supervised release pursuant to conviction and judgment as amended by order dated October 4, 2000 from United States District Court, Western District of Arkansas, Fort Smith Division, Honorable Robert T. Dawson, United States District Judge.

STATEMENT OF THE CASE

Petitioner, a citizen of Fort Smith, Arkansas for over 20 years, is a licensed Doctor of Chiropractic. He served the United States of America in the armed forces with the 82nd Airborne Division.

IRS agent Tom Bryan began a criminal investigation of Dr. Roberts in 1995 for failure to make tax returns. During the investigation, Dr. Roberts asked for a citation of the laws thought to require him to make a federal income tax return on numerous occasions. Neither Mr. Bryan nor any other officer of the United States ever provided any substantive answers to those questions.

Previous to the case herein, Petitioner filed three separate lawsuits, seeking a declaratory judgment stating

his obligations under the law with respect to the tax returns at issue in this case. Each case was dismissed on grounds of lack of jurisdiction, with the Eighth Circuit upholding the dismissal of the last action.

The district court and appellate courts have refused to address Petitioner's claim that this Court's holding in *Bryan v. United States*, 524 U.S. 184 (1998) quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991) requires that the jury in a willful failure to make tax return case must find that the defendant was aware of the specific provision of the law he was charged with violating.

In addition, the district and appellate courts have stood mute in the face of conflicts created by the Supreme Court of the United States holdings in *United States v. Sullivan*, 274 U.S. 259 (1927) and the holding of this Court in *Garner v. United States*, 424 U.S. 648 (1976).

On March 21, 2000, the United States Attorney obtained a Grand jury indictment against Petitioner for "willfully failing to make a tax return for the years 1993 and 1994" and "all in violation of section 7203." Petitioner challenged the sufficiency of the indictment on the ground that the indictment alleged a violation of a penalty statute, but omitted the citation of any substantive statute requiring the making of any return.

On June 29, 2000, a jury found Petitioner guilty on both counts. On May 16, 2001, a three judge panel from the eighth circuit affirmed in an unpublished opinion which failed to address most of the substantive issues raised, and generally cited pre-*Cheek* cases from other circuits in support of their opinion. On July 6, 2001, the

eighth circuit court of appeals denied Petitioner's Petition for Panel Rehearing and also denied Rehearing En Banc.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. **In *Bryan v. United States*, 524 U.S. 184, 194 (1998) the Court said "[I]n certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the *specific provision* of the tax code that he was charged with violating." quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991). In this case the indictment did not purport to cite any substantive statute thought to have been violated. The District Court refused to require the government to state the "true, correct, and complete" list of statutes for which Petitioner was to stand trial, or allow meaningful cross examination concerning the identity of the specific provision allegedly imposing the duty, or to require proof that Petitioner was "aware" of the specific provision imposing the duty.**

   The question presented is whether the government may refuse to state the specific provisions of the code allegedly imposing a duty, either by way of indictment, bill of particulars, or by testimony at trial, yet maintain a prosecution and retain a conviction for the failure to comply with the unspecified law.

The ***Fifth Amendment*** provides that "no person shall be held to answer for a. . . . infamous crime, unless on presentment or indictment of a grand jury . . . ; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty, or property, without due process of law. . . . "

The Petitioner was indicted by a grand jury for allegedly violating 26 U.S.C. § 7203 for the years 1993 and 1994. Section 7203 provides that:

> Any person required under this title to pay any estimated tax or tax, or required ***by this title*** or ***by regulations*** made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, *at the time or times required by law or regulations*, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.
>
> (Emphases added)

Section 7203 employs the term "willful," and provides punishment only for the failure to make a return required by Title 26 or its regulations. This Court has often said that a grand jury must allege each element of a crime in an indictment and the jury empaneled for trial must find the presence of each of these elements beyond a reasonable doubt. As the Court said in *Jones v. United States*, 526 U.S. 227, 232 (1999), "[M]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable

doubt." See, e.g., *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995).

The term "willful" imposes upon the government certain duties, well established by caselaw. "Willfulness" actually encompasses three elements that must be established by the government. In *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Court set forth these three elements, underlined in the quote below:

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that *the law imposed a duty on the defendant*, that *the defendant knew of this duty*, and that *he voluntarily and intentionally violated that duty*. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that, because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because *one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist*. In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not

> the claimed belief or misunderstanding is objectively reasonable.
>
> (Emphases added)

The Court reaffirmed these principles in *Bryan v. United States*, 524 U.S. 184 (1998) by saying "[I]n certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant **was aware of the *specific provision* of the tax code** that he was charged with violating." *Id.* at 194; quoting *Cheek* at 201. (Emphasis added)

Section 7203 neither commands anything nor prohibits anything. No one has ever violated § 7203. Section 7203 merely fixes the punishment to be meted out if any specific provision or regulations from Title 26 have not been complied with.

This being said, § 7203 only fixes punishment for the *willful* violation of one among many of the several classes of acts with no specific reference to any specific provision. However, it is clear this Court has broken the willfulness requirement into three distinct elements.

The indictment did not allege, nor did the government attempt to prove, any specific statute requiring the making of a tax return. Petitioner was strictly forbidden to inquire of any witness concerning the law requiring the making of a tax return even though this was an element of the crime for the jury to consider. The District Court expressed exasperation at questions asked in an attempt to determine specific legal provisions thought to impose the duty violated. At page 361 of the trial transcript the following colloquy took place:

> THE COURT: ***You want to ask him about the specific sections and have him read the code? He's not going to do that.***
>
> MR. STILLEY: Well, let's bring the jury back in. I'll do my best. I hardly –
>
> THE COURT: What I want to know is what questions you're going to ask, Mr. Stilley. I don't want to bring the jury back in and have you ask that same question you've asked time and time again. What are you going to ask when the jury comes back in? I want to know what questions you're going to ask, ***because if that's the only question you're going to ask, you're not going to ask any more questions, Mr. Stilley.*** Do you have other questions that you need to raise, you need to put in for Dr. Roberts' defense?
>
> (Emphases added)

The only evidence the District Court allowed the jury to consider in finding the second element "that the defendant knew of this duty," was that in 1988 and 1989 petitioner signed and submitted other unrelated forms to the government. The jury was informed thus only of the barest inference of a legal duty and knowledge of that duty on the part of Petitioner.

The District Court prohibited Petitioner from introducing evidence that he had thrice sought a declaratory judgment on the question of whether or not he was required by law to make and file a federal income tax return. He was told each time that the District Court had no jurisdiction to rule upon such a question. In the last

case, the Eighth Circuit agreed with the District Court, finding that no jurisdiction existed for the declaratory judgment sought. All this was relevant to "good faith" yet was disallowed by the District Court.

In its response brief filed 10 days late with the Eighth Circuit Court of Appeals, the government admitted, for the first time in this litigation, that the amount alleged in the indictment as that which triggered the requirement for the filing of a tax return was established by an "internal revenue procedure." The direct language of § 7203 establishes that the requirement must come from "this title." There is no statute in the Internal Revenue Code which makes an internal revenue procedure a part of the Internal Revenue Code. Most certainly if it were part of the law, the government would have been required to show Petitioner had knowledge of this "internal revenue procedure." They did not.

To the extent that the government might complain about the difficulty of codifying a number that changes year by year, the regulations appurtenant to Title 26 are well adapted to the publication of such numbers.

It is plain to see that Dr. Roberts could have memorized Title 26 and every regulation appurtenant thereto, yet would not have had knowledge of any legal requirement, pursuant to Title 26 and its regulations, to make a return. This is why the government refused to commit itself to any statute or set of statutes as being the "true, correct, and complete" set of statutes thought to encompass the duty required to be proven as an element of the crime of both failing to act and acting willfully.

Petitioner demanded at arraignment, pretrial and at trial that he be notified of the specific provision of the law he was accused of having been aware yet failed to obey. The District Court refused throughout the case to either dismiss the indictment or compel the government to state the "true, correct, and complete" list of statutes thought to impose the duty allegedly violated.

Neither the government nor the grand jury ever alleged the specific provision of the law thought to encompass the "duty." Likewise, neither the grand jury nor the government ever alleged that Petitioner knew or was aware of this specific provision. Without the allegation or proof of a specific provision, and knowledge of same on the part of the defendant, Petitioner was denied both the right to a legally sufficient grand jury indictment, and the right to a trial by jury as guaranteed by the Fifth and Sixth Amendments to the US Constitution.

Bryan requires that the jury find Defendant was aware of the specific provision of the ***tax code*** he is charged with violating. No one can dispute Petitioner was charged with violating § 7203. Therefore, the jury should have been required to find that Petitioner was aware of § 7203 and a specific duty imposed by same.

The problem with this is that under *Cheek* the second element is that Petitioner knew of his *duty*. According to § 7203, Petitioner had no duty to do or say anything. There is no way the government could ever prove that Petitioner ***voluntarily and intentionally violated that duty***. That duty. What duty? Unless the government can identify any duty commanded of Petitioner according to § 7203, Petitioner's conviction must be reversed.

The grand jury did allege that Petitioner acted willfully. However, the only statute that may be considered is § 7203, as no other legal provision was alleged in the indictment. No one can willfully violate § 7203, as it commands nothing and forbids nothing. The allegation that Petitioner "willfully violated § 7203" makes no legal sense. Section 7203 contains the term willfully, but it only references the willful violation of *some other unspecified provision of the code.*

As to the elements of willfulness, the jury must find and determine the facts with respect to the factual allegations of the indictment. As to the element regarding the law imposing a duty, no specific provision which might possibly impose a duty on Petitioner is contained in the indictment. If the government is going to claim the law imposes a duty on Petitioner, it must identify specifically that duty upon which their claim is based since that duty is an element of a crime for a jury to find beyond a reasonable doubt, on the authority of *Cheek* and *Bryan*, supra.

Otherwise, Petitioner or any person similarly situated is reduced to guessing as to what act or condition may have served to trigger the requirement of the act or omission on account of which the charge was brought. The jury can only verify a grand jury allegation that Petitioner knew of the specific provision giving rise to the duty, considering evidence both for and against the element. By failing to identify the "duty," the government has denied Petitioner's right to jury trial.

The indictment fails to allege Petitioner was aware of § 7203. The government presented no evidence that Petitioner was aware of § 7203, as inadequate as such statute may be, standing alone. And the government is not at liberty to prove knowledge of a specific statute not alleged in the indictment, where, as here, knowledge is an element of the offense, and so denominated by this United States Supreme Court.

At no time will the government produce a specific provision of the tax code or regulation establishing the claimed dollar amounts, upon which 26 U.S.C. § 7203 ***conditions*** the establishment of a legal penalty. In this case the admission was delayed until long after trial, during briefing for the Eighth Circuit.

The indictment does not allege that any statute establishes any particular sum as a minimum amount established by law or regulation to trigger a requirement to make any return of tax. The government cannot prove any such statute, even if invited to do so in clear contravention of the general legal principles governing prosecution upon indictment, or they would have done so.

Although Petitioner adamantly objected to the Court's jury instruction regarding "willfulness," since it did not accurately portray this Court's holding in *Cheek* at 201, breaking it down into three elements (there was a duty, he knew of the duty and he intentionally and voluntarily failed in the duty), the District Court failed or refused to direct the jury to the three element test. Instead, the jury was instructed that "willfulness" is the "voluntary, intentional violation of a known legal duty."

This instruction confused the jury and deprived Petitioner of a jury determination of each element of the § 7203 charge.

2. Lower court applications of *United States v. Sullivan*, 274 U.S. 259 (1927) and *Garner v. United States*, 424 U.S. 648 (1976), dealing with compulsory self-incrimination, place them in irreconcilable conflict with each other. The question in this case is whether or not the government may compel the giving of testimony under oath which would in and of itself inescapably incriminate by admission of an element of a crime, regardless of the substance of the testimony given and make it a crime for remaining silent instead of testifying.

The *Fifth Amendment* ensures that "no person shall be held to answer for a . . . infamous crime, unless on presentment or indictment of a Grand jury . . . ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty and property, without due process of law. . . . "

Petitioner has thrice sought review of the issues under this heading by civil proceedings. Each time the litigation was rejected on the grounds that the District Court had no jurisdiction.

The District Court's rulings in the criminal case herein puts this Court's construction of *United States v. Sullivan*, 274 U.S. 259 (1927) squarely up against the holding by the Supreme Court in *Garner v. United States*, 424 U.S. 648, 653 (1976).

In *Garner*, this Court has said "[t]he information revealed in the preparation and filing of an income tax return is, for the purpose of Fifth Amendment analysis, the testimony of a 'witness.' " *Garner* at 653.

In *United States v. Sullivan*, the Court said "if the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not *on that account* refuse to make any return at all." *Sullivan*, 274 U.S. 259 (1927) (emphasis added). The *Sullivan* Court addresses the answering of certain questions on a tax form and the relevance of claiming the Fifth Amendment as to some of the questions.

The *Garner* decision establishes that the signing and filing of a tax return, under penalty of perjury, is the testimony of a witness as that term is used in the Fifth Amendment. In *Garner*, the petitioner was described as a person who "voluntarily signed" his own confession.

The key requirement of the Fifth Amendment is that the citizen not be compelled to give testimony that may incriminate or be used against him in a criminal case. "To sustain the privilege, it need only be evident from the implications of the questions, in the setting in which it is asked, that a responsive answer to the question *or an explanation of why it cannot be answered* might be dangerous because injurious disclosures could result." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (emphasis added).

As the Court explained in *Lisenba v. California*, 314 U.S. 219, 241 (1941), In each situation the relevant factor was held to deny the individual a "free choice to admit,

to deny, or to refuse to answer." Some 25 years later, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court said: "To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of . . . responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."

Fundamentally, the relevant question is whether the United States can punish Appellant for refusing to submit testimony, under penalty of perjury, which would have incriminated him *regardless of the substance of the testimony given*. It is extremely important to note that the contents of the written form is immaterial, for Fifth Amendment analysis, on this subpoint. Appellant might have pleaded the Fifth Amendment to every question, without in any way protecting his right not to be a witness against himself, or his privilege against self-incrimination. A form that claimed the Fifth Amendment at every possible opportunity would have been just as incriminating as one that answered every question fully and accurately.

In this case, we must examine the principles of *United States v. Sullivan*, 274 U.S. 259 (1927), and compare those principles to the principles announced in *Garner v. United States*, 424 U.S. 648, 653 (1976), and the cases embedded therein. In *Sullivan*, the Court stated:

> . . . In determining the nice balance that exists between the constitutional rights of the individual and the sovereign's right to compel information necessary for governmental purposes the courts will go as far "as may be consistent with the liberty of the individual." This is illustrated in *Mason v. United States*, 244 U.S. 362, and *Ex parte Irvine*, 74 Fed. 954. The taxpayer will not be

> permitted to set himself up as the judge of his rights under the Fifth Amendment. ***He must comply with the Government's demand on him for information at least to the point where the information would tend to incriminate.*** *Podolin v. Lesher Warner Dry Goods Co.*, 210 Fed. 97. In this case respondent failed to raise any claim of immunity he might have had under the Fifth Amendment in the proper manner and form, and in the failure to do so his privilege must be deemed to be waived. *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103.
>
> (Emphasis added)

Next one must examine the holding of *Garner v. United States*, where the Court said: " . . . an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege," citing *United States v. Kordel*, 397 U.S. 1, 7-10 (1970).

Finally, we must examine three cases embedded in *Garner*, for guidance in circumstances where the very act of making of the form, signed under penalty of perjury, constitutes a testimonial and incriminating act. The *Garner* Court said, at 658:

> Garner relies next on *Mackey v. United States*, 401 U.S. 667 (1971), the relevance of which can be understood only in light of *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). In the latter cases the Court considered whether the Fifth Amendment was a defense in prosecutions for failure to file the forms required of gamblers in connection with the federal occupational and excise taxes

> on gambling. The Court found that any disclosures made in connection with the payment of those taxes tended to incriminate because of the pervasive criminal regulation of gambling activities. *Marchetti*, supra, at 48-49; *Grosso*, supra, at 66-67. Since submitting a claim of privilege in lieu of the forms also would incriminate, the Court held that the privilege could be exercised by simply failing to file.

Appellant could not by the omission of any statement or information requested on the tax forms for the years 1993 and 1994 negate this implied testimony of knowledge of the "requirement" to make and file tax forms in 1992 and previous years. Perhaps Garner could have omitted the admission that he was a gambler, or claimed the 5th on his form as to his occupation. No such option existed for Appellant. ***The omission for which Appellant is incarcerated was the only option save the admission, by Appellant, of an essential element or at least evidence of an element of, another completely independent "crime" for which the Government could have prosecuted him, under the Government and the District Court's theory of 26 U.S.C. § 7203 prosecutions.***

In fact, for every year except the first year of failure to make, the nonfiler is necessarily brought within circumstances under which *Garner* plainly states that nonfiling necessarily constitutes a valid claim of the Fifth Amendment privilege. Appellant's situation is uncontrovertibly one where the courts must sustain his claim of privilege. See *United States v. Murdock*, 284 U.S. 141 (1931), where the Court said:

> . . . The courts should sustain the witness's claim of privilege unless it is clear that the evidence obtainable from his testimony could not by any possibility incriminate him. *Ballman v. Fagin*, 200 U.S. 186; *Internal Revenue Agent v. Sullivan*, 287 Fed. 138.

Pursuant to the rulings of the District Court in Appellant's trial, tax forms made by a CPA and signed under penalty of perjury by Appellant (whenever filed) are proof of an element of the offense, namely knowledge of legal duty to make a form. The Government cannot compel that information from Appellant. The Government is duty bound to prove its case by the independent labor of its own officers, not by the simple but cruel expedient of forcing the information from the defendant's own lips. *Mitchell v. United States*, 526 U.S. 314 (1999).

The *Sullivan* decision is recited, in a simplistic fashion, for the proposition that a person cannot simply fail to make or file a tax statement with the United States based upon Fifth Amendment implications involving testimony. The limiting language of that decision is generally disregarded. On the other hand, the *Garner* decision is recited for the theory that any person who ***does*** make and submit a tax statement has waived the Fifth Amendment privilege against self-incrimination as to the information revealed under penalty of perjury, either directly or by implication. Petitioner is unable to refuse to make a tax return under penalty of perjury on the one hand, and at the same time is said to have waived the Fifth Amendment as to all tax returns made. Surely if a waiver is construed then preservation of the right must be an option.

In this case, Petitioner failed to file for the years 1990 through 1992. The sole "evidence" of a law requiring the making of a return, and Petitioner's knowledge of that return, was the filing of returns previously made, or if available, any subsequently filed returns. The government acknowledged the weakness of its proof on that issue at page 10 of its brief, stating:

> In this case, the privilege likewise must yield to "the character and urgency of the opposing revenue interests." *Carlson*, 617 F.2d at 523. The protective aspects of the privilege are minimal in this case, given that defendant's filing of his returns for the prosecution years would have said little, if anything, about defendant's knowledge of the duty to file returns when he failed to file returns for 1990 through 1992.

This claim is diametrically opposed to the caselaw and common sense. There "is no 'tax crime exception' to the Fifth Amendment." *United States v. Troescher*, 99 F.3d 933, 936 (9th Cir. 1996). Every Supreme Court case on the subject, even those presenting a balancing test, permit the refusal to make a testimonial statement where that statement is necessarily incriminating.

Petitioner could not preserve his Fifth Amendment rights regarding the possible answers to the questions of the tax form sought by the government, by means other than the act of remaining silent. The Fifth Amendment claims made by Petitioner are wholly separate and distinct from that of the claims advanced in *Garner* and *Sullivan*. The failure to act or an omission is the same as the act of remaining silent. The government charged Petitioner with a crime for remaining silent. In *Doyle v. Ohio*,

426 U.S. 610 (1976), the defendants, after being arrested for selling marijuana, received their Miranda warnings and chose to remain silent. At their trials, both took the stand and claimed that they had not sold marijuana, but had been "framed." 426 U.S., at 613. To impeach the defendants, the prosecutors asked each why he had not related this version of events at the time he was arrested. This Supreme Court held that this violated the defendants' rights to due process because the Miranda warnings contained an implicit "assurance that silence will carry no penalty." *Id.*, at 618. *Portuondo v. Agard*, 529 U.S. 61 (2000).

This Supreme Court has "consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam). The Miranda warnings had, after all, specifically given the defendant both the option of speaking and the option of remaining silent – and had then gone on to say that if he chose the former option what he said could be used against him.

Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). We cannot depart from this noble heritage.

Petitioner has given the District Court and the Eighth Circuit Court of Appeals many opportunities to address this issue, both civilly and criminally, and they have emphatically refused any meaningful analysis.

The Eighth Circuit panel used three sentences for analysis of the important Fifth Amendment self-incrimination claim raised by Petitioner. The panel cited only *dicta* from an appeal of a single *civil case* brought by a *pro se* litigant concerning *liability for an assessed tax*. The case, *Ueckert v. Comm'r of Internal Revenue*, 721 F.2d 248, 250 (8th Cir. 1983), contains rank dicta about the possibility of the Fifth Amendment's potential protection against answering some or all questions that might be presented by the government on or for use in tax forms.

No matter how much the *Ueckert* court had analyzed Ueckert's Fifth Amendment claims, that court's decision on the matter would have had absolutely no bearing on the outcome of Ueckert's appeal. In that appeal, the sole question was whether or not Ueckert *owed a tax* assessed against him by the Commissioner of Internal Revenue.

The panel cited but a single case,[1] in which a bunch of government lawyers whipped up on a *pro se* litigant arguing a matter wholly immaterial to the question of tax liability at issue in that case. This citation of such patently weak "authority" suggests that the *Sullivan-Garner* paradox is worthy of Supreme Court review.

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[1] The Court notes that the *Ueckert* decision cites to the *Sullivan* decision for support. Why didn't the panel cite to *Sullivan* directly? The panel thus implies that *Sullivan*, taken with *Garner*, support the validity of Petitioner's Fifth Amendment self-incrimination claim.

Dicta is properly usable only where the question has not been adjudicated directly in a case involving adverse parties in a genuine controversy. See, e.g., *St. Paul Fire & Marine Insurance Co. v. Zotta*, 149 F.3d 878, 880 (8th Cir. 1998), where the Court said:

> In the absence of any controlling Missouri Supreme Court authority, we may consider "relevant state precedent, analogous decisions, considered dicta, . . . and any other reliable data." Id. (quoting *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir. 1995)

Thus the Eighth Circuit panel tacitly admits that it has no authority on point. Yet the Eighth Circuit panel's decision was not designated for publication. This too militates in favor of a writ of certiorari.

Why does the Eighth Circuit panel suggest that the law on the point raised is not clearly stated in the Eighth Circuit, yet leave the citizens without any binding precedent for guidance? A non-published case does not put other citizens on notice of the state of the law within the Eighth Circuit. The panel decision irreconcilably conflicts with *Marchetti, Mackey, Garner, Murdock, Kordel*, and *Mitchell*. The citizens are entitled to a definitive answer on the question posed herein.

3. **Petitioner has never been assessed a tax for the years charged in the indictment. Without a tax loss, every aspect of Petitioner's punishment would have been greatly reduced or eliminated completely. The Eighth Circuit panel decision with respect to tax loss cites only one pre-*Cheek* case from the Seventh Circuit, demonstrating once again that the panel decision is unsupportable by any existing Eighth Circuit and Supreme Court precedent. This triggers the question whether the United States Courts may, while imposing a punishment for a finding of an omission crime, namely, 26 U.S.C. § 7203, bypass internal revenue assessment procedures and order Petitioner to pay some $58,000 in "restitution" to the Internal Revenue Service with no express finding that Petitioner owed an income tax for the years charged in the indictment, even though failure to pay was not part of the criminal indictment.**

The whole underpinning of the judgment is the enhancement of points arising from the claimed tax loss. If there is no tax loss, then the offense level is 6, which according to 18 U.S.C. Appx. 2T3.2, with an offense level of 6, the sentence of confinement is 0-6 months, and the *maximum* fine is $5,000.

With a tax loss of $58,868.18, the offense level is 13. This offense level is necessary to support the judgment of the Trial Court fixing a sentence of 16 months incarceration, as well as the $30,000 fine imposed.

The original September 26, 2000, judgment, at page 5, (Appendix at 14) says:

> Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

These statutes do not remotely stand for the proposition a "tax loss" may be assessed in this case. These chapters deal with sexual abuse (109A), sexual exploitation of children (110), domestic violence and stalking (110A), and telemarketing fraud (113A). None of these chapters under any stretch of the imagination authorize a federal court to collect unassessed taxes alleged to be due.

The original judgment contains a column for "Total Amount of Loss." This column is blank. Confronted with pleadings pointing out the obvious flaws in the original findings, the District Court entered an amended judgment. The amended judgment left off the column entitled "Total amount of loss." The District Court, unwilling to make a specific finding of a tax loss, simply erased the column. Compare Appendix pages 14 and 26. **The District Court consciously decided not to make an express finding of a tax loss.**[2]

The dignity of the judiciary demands a judgment at least *allege* a tax loss occurred, if a citizen is to be ordered

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[2] The Eighth Circuit decision panel finds it "odd" that Roberts claims there is no tax loss. Yet the Trial Court declined to expressly find a tax loss, in the face of questions by defense counsel. The government has failed in the last decade to make any assessment against Roberts. So who is odd; the government for claiming that it can fabricate tax liability out of thin air, or Petitioner, who maintains pursuant to Supreme Court cases, that a tax is not owed unless and until it is assessed?

to make restitution and suffer additional penalties on account of the supposed loss. If the District Court actually found a tax loss, it should have stated that fact and the statutory basis therefor in the judgment. Absent proof of tax loss, the judgment is uncontrovertibly illegal. *United States v. Tucker*, ___ F.3d ___ (8th Cir. 2000).

Congress spells out the procedures by which an assessment is authorized. See 26 U.S.C. § 6201. Currently, there is no record of assessment of Petitioner recorded with the office of the secretary pursuant to 26 U.S.C. § 6203 or § 6204.

26 U.S.C. § 6213 provides "no assessment of a deficiency in respect of any tax imposed by Subtitle A or B . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer nor until the expiration of 90-day or 150-day period, as the case may be, nor if a petition has been filed. . . . " None of these procedures have been commenced in Dr. Roberts' case. The only "notice" is an indictment. Section 6213 does not carve out an exception for "indictment by a Grand Jury."

The indictment would most certainly not qualify even under the standards of notice pursuant to 26 U.S.C. §§ 6212 and 6213. If the government could not prevail pursuant to the contents of the allegations in the indictment, regarding proper notice and proper assessment, a tax loss would surely not be allowable unless satisfying the mandates of section 6213. And without tax loss it is plain that the majority of the fine, all the restitution, and most of the incarceration is legally impossible.

The Eighth Circuit decision panel telegraphs the weakness of its opinion to the world by citing only one Seventh Circuit case to support its conclusion that a valid tax assessment is not required to establish a tax loss, while refusing to publish its opinion as Eighth Circuit precedent. Both the reasoning and the result in *United States v. Dack*, 747 F.2d 1172 (7th Cir. 1984) are fundamentally flawed.

Since the procedures in the law provide the due process for taking property regarding taxation, the District Court erred in skirting clearly established legal principles involving due process under 26 U.S.C. §§ 6211, 6212 and 6213. The Supreme Court has held that assessment is predicate to liability for a tax. See *Bull v. United States*, 295 U.S. 247 (1935):

> A tax is an exaction by the sovereign. . . . The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. ***The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment***. . . . ***Once the tax is assessed*** the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. . . .
>
> In recognition of the fact erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, ***invariably*** afford the taxpayer an opportunity at some stage to have mistakes rectified. . . . If which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. . . .
>
> (Emphasis added)

Since no assessment has been made, then no tax can be owed. Since no tax is owed, then no tax loss can be established. Since no tax loss was established or expressly found in the amended judgment of conviction, the Court's enhancement of the sentencing category from 6 to 13 is unsupported by the law and the facts of the case. Tom Bryan, the witness purporting to establish facts from which the tax loss was determined, said he was not authorized to assess nor does he know of any existing assessment against Petitioner.

The Government may suggest a subsequent action to recover any overcharge. In fact, Tom Bryan recognized a civil proceeding in compliance with law might be brought to collect taxes. However, Mr. Bryan pleaded ignorance to virtually all questions of when the liability became due and whether the liability was correct.

18 U.S.C. § 3664(e) provides:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

The action of the District Court uncontrovertibly destroyed the statutory rights of Petitioner in any subsequent civil proceedings. Section 3664(e) does not specifically require a finding of loss, of tax or otherwise, in order to trigger the collateral estoppel features of that statute. Therefore, the judgment of the District Court ordering restitution based upon testimony of one professing ignorance of tax law, if allowed to stand, prevents

Petitioner from later challenging those findings in the manner guaranteed to him by statute even if no express finding of tax loss is ever found. The amended judgment of conviction therefore violates all notions of substantial justice and fair play, and thus deprives Petitioner of substantive due process. *Burnham v. Superior Court of Cal., Marin County,* 495 U.S. 604 (1990), *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

When a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain remedy," for the deprivation of tax moneys in an unconstitutional manner. *McKesson Corp. v. Florida Alcohol & Tobacco Div.,* 496 U.S. 18 (1990). Thus Petitioner has been deprived of the process guaranteed by the decisions of the US Supreme Court.

CONCLUSION

Based upon the reasons set forth herein, the Court should grant Dr. Roberts' petition and issue a writ of certiorari.

Respectfully submitted,

PHILIP E. ROBERTS
302 N. Greenwood
Fort Smith, Arkansas 72901
(501) 782-9505
Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3405

United States of America, Appellee, v. Philip E. Roberts, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas [UNPUBLISHED]

Submitted: April 10, 2001

Filed: May 16, 2001

Before HANSEN and BYE, Circuit Judges, and MELLOY,[1] District Judge.

PER CURIAM.

A jury convicted Philip Roberts of willfully failing to file income tax returns for the years 1993 and 1994. The district court[2] sentenced Roberts to 16 months in prison and a one-year term of supervised release. The court also imposed restitution of $58,868.19, a $30,000 fine, and a

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[1] The Honorable Michael J. Melloy, United States District Judge for the Northern District of Iowa, sitting by designation.

[2] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

$50 special assessment. Roberts now appeals several aspects of his conviction and sentence. We affirm.

In 1987, Roberts opened a chiropractic clinic in Forth Smith, Arkansas. For the next three years, Roberts paid federal and state income taxes. Starting in 1990, however, Roberts didn't file federal income tax returns or pay taxes. In 1993, Roberts earned approximately $123,000 in gross income, and in 1994, Roberts earned roughly $207,000. In March 2000, a grand jury indicted Roberts on two counts of failing to file income tax returns for the 1993 and 1994 tax years, violations of 26 U.S.C. § 7203. Roberts proceeded to trial in late June 2000; following a three-day trial, the jury convicted him on both counts.

Roberts raises five categories of claims in this appeal. We find that none of these claims of error has merit.

1. Roberts contends that the requirement to file a tax return under penalty of perjury violates his Fifth Amendment rights. He argues that if he had filed returns for 1993 and 1994, he would essentially have incriminated himself by demonstrating knowledge of the filing requirements for the other years when he failed to file a return, 1990, 1991, and 1992. We reject this argument because "[a] taxpayer cannot rely on the privilege against self-incrimination to refuse to disclose any information or to fail to file a tax return." *Ueckert v. Comm'r of Internal Revenue*, 721 F.2d 248, 250 (8th Cir. 1983) (per curiam) (citing *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927)).

2. Roberts alleges that his indictment was defective because it failed to cite the statute requiring him to pay

income taxes, 26 U.S.C. § 6012. An indictment is ordinarily sufficient if it states each material element of the offenses charged. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Though Roberts's indictment did not mention § 6012, the document cited 26 U.S.C. § 7203, which explicitly imposes punishment for willfully failing to file a tax return, and recited the various elements of § 7203. Roberts was fully aware of the charges he faced because, in addition to the plain language in the indictment, the district court required the government to file a bill of particulars. Thus Roberts received constitutionally proper notice of the charges levied against him. *See United States v. Vroman*, 975 F.2d 669, 670-71 (9th Cir. 1992) ("The government was not required to cite [ ] § 6012 in the indictment in order to give [defendant] notice of the charges filed against him."); *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir. 1978) (same).

3. Roberts contends that the district judge should have recused himself. Roberts recites a laundry list of "bad acts": the district judge denied bail for improper reasons, dismissed related civil tax suits brought by Roberts without justification, improperly reviewed the magistrate judge's reports and recommendations, limited Roberts's objections at trial and at sentencing, and made improper comments at arraignment. Roberts also claims that the district judge "acted as an accuser" by listing the statutes Roberts had violated. These accusations amount to disagreements with court rulings, which do not form a proper basis for recusal. *Harris v. State of Mo.*, 960 F.2d 738, 740 (8th Cir. 1992). We have reviewed the record in this case and we conclude that the district judge presided

in a fair and impartial manner. The district judge therefore properly declined to recuse himself.

4. Roberts argues that the district court miscalculated the tax loss and imposed too harsh a sentence. We disagree. "[T]he guidelines contemplate that the court will simply make a reasonable estimate [of the tax loss] based on the available facts." U.S.S.G. § 2T1.1, app. n.1. The Presentence Report calculated the total tax loss at $18,771 for 1993 and $40,096 for 1994, and IRS Special Agent Tom Bryan testified to these amounts at the sentencing hearing. Roberts objected, and he cross-examined Agent Bryan at the hearing. After considering both the evidence and the objections, the district court adopted the tax loss estimate contained in the Presentence Report as its finding. Roberts has not shown that the court's findings were erroneous; he has only claimed (oddly) that the government suffered *no loss* as a consequence of his failure to pay income taxes. We find that the court's tax loss calculations were not in error.

Roberts also argues that his sentence is erroneous because the IRS failed to submit a formal assessment of his tax liability. A valid, formal assessment was not required in this instance, and we therefore reject Roberts's argument. *See United States v. Dack*, 747 F.2d 1172, 1174-76 (7th Cir. 1984) (per curiam).

5. Finally, Roberts raises a farrago of (mostly) constitutional claims of error. He charges that the government violated his rights to compel the attendance of, and to cross-examine, certain government witnesses; that the district court lacked venue; that the jury instructions, the composition of the jury pool, and the court's conduct

during voir dire were improper; and that the court erred in ruling on a variety of related matters. We have reviewed the record and we believe that Roberts's claims of error are unfounded. *See* 8th Cir. R. 47B.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3405	*	
	*	
United States of America,	*	Appeal from the United States District Court for the Western District of Arkansas
Appellee,	*	
	*	
v.	*	
	*	
Philip E. Roberts,	*	
	*	
Appellant.	*	
	*	

JUDGMENT

(Filed July 16, 2001)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

May 16, 2001

A true copy.

ATTEST: /s/Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

Western District of Arkansas

UNITED STATES OF AMERICA

v.

PHILIP E. ROBERTS
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

(Filed Sep. 26, 2000)

Case Number:
2:00CR20C18-001

Oscar Stilley
Defendants Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s).

[ ] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.

[X] was found guilty on count(s) 1 and 2 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
28 U.S.C. 7203	Failure to File Income Tax Return	04/16/1994	1
26 U.S.C. 7203	Failure to File Income Tax Return	04/16/1995	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: 430-08-8789
Date of Birth.: 07/05/1954
USM No.: 05997-010

Residence Address:

4900 Park Avenue, #314
Fort Smith, AR 72903

Mailing Address:

(if different from residence address)

September 26, 2000
Date of Imposition of Sentence

/s/ Robert T. Dawson
HON. ROBERT T. DAWSON
UNITED STATES
DISTRICT JUDGE
September 26, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 16 months. The term of imprisonment consists of 9 months on count 1 and 7 months on count 2, to run consecutively.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

  [ ] at.

  [ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

  [X] before 1:00 p.m. on October 27, 2000.

  [ ] as notified by the United States Marshal.

  [ ] as notified by the U.S. Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year. The term of supervised release consists of 1 year on each count, all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall comply with officials of the Internal Revenue Service in the filing of any delinquent federal income tax returns and any returns presently due.

2. The defendant shall cooperate with the probation office by providing any requested information related to his financial circumstances.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$50,000	$30,000.00	$58,868.18

[ ] If Applicable, restitution amount ordered pursuant to plea agreement ..... $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $0.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[X] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[X] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred, until An Amended Judgment in a Criminal Case will be entered after such determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Internal Revenue Service		$58,868.18	
Totals:		**$58,868.18**	

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim(s).

**Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or*

B [ ] $ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than; or

D [ ] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

It is ordered that defendant pay a fine in the amount of $30,000, payable to the U.S. Clerk, within ten (10) days of the date of sentencing; further, that defendant make restitution in the amount of $58,868.18, payable directly to the Internal Revenue Service, within ten (10) days of the date of sentencing.

[ ] Joint and Several

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the:

Clerk U.S. District Court, United States District Court, P.O. Box 1547, Fort Smith, Arkansas 72902.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 13.

Criminal History Category: 1.

Imprisonment Range: 12 to 18 months.

Supervised Release Range: 1 year.

Fine Range: $3,000. to $30,000.

[ ] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $58,868.18

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994, but before April 23, 1995, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[ ] The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

UNITED STATES DISTRICT COURT

Western District of Arkansas

UNITED STATES OF AMERICA

v.

PHILIP E. ROBERTS
Name of Defendant

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 4, 2000)

Case Number: 2:00CR20018-001

Oscar Stilley
Defendant's Attorney

Date of Original Judgment: September 26, 2000
(or date of Last Amended Judgment)

[ ] Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
[ ] Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
[ ] Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
[x] Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
[ ] Modification of Supervision Conditions (18 U.S.C. 3563(c) or 3563(e))
[ ] Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. 3582(c)(1))
[ ] Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. 3582(c)(2))
[ ] Direct Motion to District Court Pursuant to [ ] 28 U.S.C. 2255. [ ] 18 U.S.C. 3559(c)(7) or [ ] Modification of Restitution Order

THE DEFENDANT:
[ ] pleaded guilty to count(s).
[ ] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.
[X] was found guilty on count(s) 1 and 2 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 U.S.C. 7203	Failure to File Income Tax Return	04/16/1994	1
26 U.S.C. 7203	Failure to File Income Tax Return	04/16/1995	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
[ ] The defendant has been found not guilty on count(s)
[ ] Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:
Soc. Sec. No.: 430-08-8789
Date of Birth: 07/05/1954
USM No.: 05997-010

Residence Address:

4900 Park Avenue, #314
Fort Smith, AR 72903

Mailing Address:
(if different from residence address)

September 26, 2000
Date of Imposition of Sentence

/s/ Robert T. Dawson
HONORABLE
ROBERT T. DAWSON
UNITED STATES
DISTRICT JUDGE

October 4, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: **16 months**. The term of imprisonment consists of 9 months on count 1 and 7 months on count 2, to run consecutively.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at.
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] before 1:00 p.m. on October 27, 2000.
[ ] as notified by the United States Marshal.
[ ] as notified by the U.S. Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year . The term of supervised release consists of 1 year on each count, all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditional on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall comply with officials of the Internal Revenue Service in the filing of any delinquent federal income tax returns and any returns presently due.

2. The defendant shall cooperate with the probation office by providing any requested information related to his financial circumstances.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$50.00**	**$30,000.00**	**$58,868.18**

[ ] If applicable, restitution amount ordered pursuant to plea agreement $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $0.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[X] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[X] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred, until, An Amended Judgment in a Criminal Case will be entered after such a determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

	Amount of Restitution Ordered
Internal Revenue Service	$58,868.18
Totals:	**$58,868.18**

Special assessment and fine payments are to be made to the Clerk, U. S. District Court, P. O. Box 1547, Fort Smith, Arkansas 72902.

Restitution payments are to be made payable directly to the Internal Revenue Service, c/o Tom Bryan, IRS-CID, 4905 Old Greenwood Road, Fort Smith, Arkansas 72903.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than; or

D [ ] in installments to commence days after the date of this judgment. If the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in installments of $ over a period of year(s) to commence day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

It is ordered that defendant pay a fine in the amount of $30,000, payable to the U.S. Clerk, within ten (10) days

of the date of sentencing; further, that defendant make restitution in the amount of $58,868.18, payable directly to the Internal Revenue Service, within ten (10) days of the date of sentencing.

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the:

Clerk U.S. District Court, United States District Court, P. O. Box 1547, Fort Smith, Arkansas 72902

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary).

Guideline Range Determined by the Court:

Total Offense Level: 13.

Criminal History Category: I.

Imprisonment Range: 12 to 18 months.

Supervised Release Range: 1 year.

Fine Range: $3,000 to $30,000.

[ ] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $58,868.18

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3405	*	
	*	
United States of America,	*	Order Denying Petition
	*	for Rehearing and for
Appellee,	*	Rehearing En Banc
vs.	*	
	*	
Philip E. Roberts,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 6, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit